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W.M., Appellant)	
)	
and)	Docket No. 12-72
)	Issued: May 21, 2012
DEPARTMENT OF ENERGY, PANTEX)	
COURIER SECTION, Amarillo, TX, Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On October 13, 2011 appellant, through his representative, filed a timely appeal from the April 27, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which suspended wage-loss compensation for his accepted post-traumatic stress disorder (PTSD). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether appellant may receive FECA wage-loss compensation concurrently with an increase in his Veterans Administration (VA) benefits for the same injury.

On August 27, 1997 appellant, a 43-year-old nuclear materials courier, filed an occupational disease claim alleging that his chronic sleep deprivation and fatigue were a result of

¹ 5 U.S.C. § 8101 *et seq.*

his federal civilian employment. He also filed a claim alleging radiation exposure in the course of his employment, to which he was last exposed on August 27, 1997, when he stopped work. OWCP accepted appellant's claim for PTSD, among other conditions. He received compensation for temporary total disability on the periodic rolls.

OWCP obtained a rating decision from the VA finding that appellant had a 100 percent disability rating for PTSD from July 13, 1998.

OWCP notified appellant that he was entitled to receive VA benefits for the same condition as his workers' compensation claim, but if the VA benefits for that condition increased after his date of injury, the increase was considered a dual benefit. It asked appellant to choose between drawing VA benefits at the previous rating and workers' compensation or drawing VA benefits at the 100 percent rating and benefits from the Office of Personnel Management without disability compensation from OWCP. OWCP advised that failure to return the enclosed Election of Benefits form would result in suspension of appellant's compensation benefits pending receipt. It further advised that the election did not affect his entitlement to medical benefits under FECA.

On September 26, 2008 OWCP suspended appellant's wage-loss compensation for PTSD for failure to make an election of benefits. On June 1, 2009 an OWCP hearing representative affirmed the September 26, 2008 decision. She noted that appellant had, through his testimony, effectively elected VA benefits.²

On April 27, 2011 OWCP reviewed the merits of appellant's claim and denied modification of its prior decision.

Appellant's representative argued on appeal that appellant disputes that he should have been required to make an election.

LEGAL PRECEDENT

While an employee is receiving compensation under FECA, he may not receive salary, pay or remuneration of any type from the United States except other benefits administered by the VA unless such benefits are payable for the same injury.³

To determine the employee's entitlement to compensation, OWCP may require an employee to submit an affidavit or statement as to the receipt of any federally funded or federally assisted benefits. If an employee fails to submit such affidavit or statement within 30 days of the date of the request, his right to compensation shall be suspended until such time as the requested

² Appellant testified that the VA benefit was greater, and he argued that he did not think he needed to make an election because he felt his PTSD was service related and completely separate from the conditions he sustained in his federal civilian employment. He stated that he was not going to accept something from his government that he should not, so he stopped seeing his psychiatrist and started going to the VA "because I knew that was where my PTSD was."

³ 5 U.S.C. § 8116(a)(3).

affidavit or statement is received. At that time compensation will be reinstated retroactive to the date of suspension provided the employee is entitled to such compensation.⁴

ANALYSIS

It is well settled that a claimant in appellant's position is required to make an election of benefits.⁵ Under section 8116 of FECA, appellant may not receive FECA wage-loss compensation for PTSD concurrently with an increase in his VA benefits for the same injury. The regulations implementing section 8116 foresaw the situation presented here, where a claimant refuses to make the required election. In such cases, OWCP will suspend the claimant's right to compensation until such time as the election is received.

From his testimony before OWCP's hearing representative, appellant notes that he should not receive compensation from OWCP for his PTSD. He considers his PTSD to be a result of his military experience and not a result of his federal civilian employment. By failing to make an election of benefits, appellant caused OWCP to suspend his wage-loss compensation for PTSD. As a practical matter, OWCP's decision leaves appellant in the position he wants: in receipt of his 100 percent disability rating from the VA and with no wage-loss compensation from OWCP for an employment-related PTSD.⁶

As appellant was not entitled to FECA wage-loss compensation for PTSD concurrently with the increase in his VA benefits for the same injury, and as he refused to make an election, the Board finds that OWCP properly suspended his right to wage-loss compensation for PTSD. The Board will therefore affirm OWCP's April 27, 2011 decision.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

⁴ 20 C.F.R. § 10.421(e).

⁵ *Gary J. Bartolucci*, 34 ECAB 1569 (1983) (finding that the claimant was required to make an election of benefits under section 8116 of FECA on the grounds that his benefits under FECA and a portion of his benefits being paid under statutes administered by the VA were payable for the same injury, thus constituting a prohibited dual benefit). The Board in *Bartolucci* noted the following legislative history: "In addition, this section amends the FECA to require an election of benefits in any case in which a claimant for compensation is eligible to receive any payment for benefits from the United States by reason of the same disability or death. A small number of cases have occurred in which the Bureau [now OWCP] has found that the disability or death of an employee has resulted from an injury sustained in civilian employment by the United States and the Veterans Administration has held that the same disability or death was caused by military service. As a result, the United States has paid compensation twice for the same disability or death. This amendment is intended to prevent payment of dual benefits in such cases in the future."

⁶ As appellant expresses no disagreement with the outcome of OWCP's decision, only with the requirement of an election, it is not clear what relief he seeks on appeal.

CONCLUSION

The Board finds that appellant may not receive FECA wage-loss compensation concurrently with an increase in his VA benefits for the same injury.

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 21, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board